Lebow, L. 150060

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Panhandle Venture V; Sterling Investment Properties, Inc.--Reconsideration

File: B-252982.3; B-252982.4

Date: September 1, 1993

Garry R. Boehlert, Esq., Watt, Tieder & Hoffar, for Panhandle Venture V, and Lindsay Simmons, Esq., Jackson & Kelly, for Sterling Investment Properties, Inc., the protesters.
Linda S. Lebowitz, Esq., Andrew T. Pogany, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protesters, the fourth and sixth low offerors, which alleged that the agency accepted a nonconforming offer from the low priced offeror and waived or relaxed solicitation requirements for this firm, are not interested parties to protest the award where, if the protests were sustained, the agency could make an award to the second low priced offeror whose offer has not been challenged.

DECISION

Panhandle Venture V and Sterling Investment Properties, Inc. request reconsideration of our May 21, 1993, dismissal of their protests of the award of a 15-year lease for a build-to-suit facility to Van Wyk Enterprises under solicitation for offers (SFO) No. MWV91-069, issued by the General Services Administration.

We deny the requests for reconsideration.

In their initial protests, Panhandle and Sterling challenged the contracting officer's evaluation of Van Wyk's offer and the award to Van Wyk. Panhandle argued that Van Wyk's site did not meet certain SFO requirements, including location of powerlines, lack of amenities, and allegedly improper site location in other than a business park. Panhandle also alleged that Van Wyk did not have relevant experience; that Van Wyk was defaulted on a prior contract; and that Van Wyk did not qualify as a small business concern. Panhandle argued that the award should have been made to a firm which actually met the SFO requirements. Sterling raised many of the same allegations concerning the compliance of Van Wyk's

site with the SFO requirements. Sterling asserted that if GSA "ignored" the SFO requirements, all offerors should have been afforded the opportunity to "ignore [the same] requirements." Sterling also generally claimed that proper negotiations were not conducted.

The agency filed a motion to dismiss the two protests on the basis that the protesters were not interested parties. The SFO stated that award would be made to the most advantageous offeror and that price was more important than the combination of technical factors. The record showed that after the agency established a competitive range of six offerors, conducted discussions with these offerors, and requested and evaluated best and final offers, the agency concluded that the six offerors were essentially technically equal. Since the offerors were deemed technically equal and because price was more important than the technical factors, the agency awarded the lease to Van Wyk which submitted the low, technically acceptable offer. Sterling offered the fourth low price and was ranked fourth in line for award, and Panhandle offered the sixth low price and was ranked sixth in line for award. Based on these rankings, the agency requested that we dismiss the two protests since neither Panhandle nor Sterling would be in line for award if their protests were sustained. After allowing the protesters an opportunity to comment, we dismissed the protests.

Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556 (1988), only an "interested party" may protest a federal procurement. That is, a protester must be an actual or prospective supplier whose direct economic interest would be affected by the award of a contract or the failure to award a contract. Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1993). Determining whether a party is sufficiently interested involves consideration of a party's status in relation to a procurement. Where there are intermediate parties that have a greater interest than the protester, we generally consider the protester to be too remote to establish interest within the meaning of our Bid Protest Regulations. Charles Redwood Ltd. Partnership, B-241050, Jan. 14, 1991, 91-1 CPD ¶ 32. A party will not be deemed interested where it would not be in line for the protested award even if the protest were sustained. Id.

In their initial protests and comments, neither Panhandle nor Sterling challenged the eligibility of the intervening offerors for award. Since these intervening offerors would precede Panhandle and Sterling in eligibility for award even if their protests were sustained, we concluded that Panhandle and Sterling were not interested parties because each lacked the direct economic interest required to

maintain a protest against the evaluation of Van Wyk's offer and the award of a lease to Van Wyk. We also noted that although Sterling generally claimed that discussions were not meaningful which, if true, would have required the reopening of the procurement and would have given Sterling status as an interested party, Sterling failed to identify any specific defect in the discussions which constituted a basis for protest.

On reconsideration, Panhandle and Sterling argue that they are interested parties because the agency allegedly waived or relaxed various SFO requirements for Van Wyk, namely, requirements concerning powerlines, location of amenities, and site location in a business park. Panhandle and Sterling assert that where the government waives or relaxes the requirements of a solicitation, the protester is an interested party even though it is not next in line for award since the appropriate relief would be resolicitation under which the protester could compete. Panhandle and Sterling cite several decisions of our Office in support of their position. E.g., Tri Tool, Inc., B-229932, Mar. 25, 1988, 88-1 CPD ¶ 310; Eklund Infrared, B-238021, Mar. 23, 1990, 90-1 CPD ¶ 328; Earth Resources Corp., B-248662.2, Nov. 5, 1992, 92-2 CPD ¶ 323.

Panhandle's initial protest alleged only a misevaluation of Van Wyk's offer by the agency and did not in any way allege a waiver or relaxation of certain SFO requirements. Accordingly, the argument raised in Panhandle's reconsideration request that it is an interested party because it seeks resolicitation due to the alleged waiver or relaxation of the SFO requirements is untimely since this argument was not raised in its initial protest challenging the contracting officer's evaluation of Van Wyk's offer and the award to Van Wyk. See Department of the Army--Recon., B-237742.2, June 11, 1990, 90-1 CPD ¶ 546.

Sterling's initial protest only contained a brief reference (one sentence) to the effect that the agency "ignored" certain SFO requirements and that Sterling should have been afforded the opportunity to also "ignore" the requirements. According to the agency, even if we concluded that the agency accepted a nonconforming offer from Van Wyk, the next firm in line for award would be the second low, technically acceptable offeror whose proposal was not alleged to be nonconforming.[1]

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[1]Since the SFO did not contain a termination for convenience clause, this Office would not recommend an award to the second low, technically acceptable offeror. Peter N.G. Schwartz Cos. Judiciary Square Ltd. Partnership, B-239007.3, Oct. 31, 1990, 90-2 CPD ¶ 353.

In cases like Tri Tool, Eklund, and Earth Resources, supra, we concluded that the protesters, which were not next in line for award, were interested parties because the protesters alleged that a waiver of requirements had occurred in awarding contracts to particular firms. In these cases, there was some indication that the agencies' needs had changed and that if the protests were sustained, the remedy would have been modification of the specifications and resolicitation. Here, unlike the cases cited by Panhandle and Sterling, it is clear to us that the SFO represents the agency's minimum requirements and that the agency did not intend to waive any requirements. Even if the award to Van Wyk, the low offeror, was improper or otherwise represented an unauthorized waiver or relaxation of the SFO requirements,[2] the agency would not be required to resolicit its requirements, but rather could legitimately award the lease to the second low offeror, whose offer has not been challenged. For these reasons, we conclude that we properly determined that Panhandle and Sterling were not interested parties.

We deny the requests for reconsideration.

for James F. Hinchman
General Counsel

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[2]With respect to the alleged waiver or relaxation of various SFO requirements for Van Wyk, we note that the SFO contained no restriction on the proximity of powerlines to an offeror's site; Van Wyk's site, located outside of a city center neighborhood for which eating facilities were required to be located within 2 miles of a site, is within 1 mile of a 24-hour restaurant, a convenience store, and a motel with a full-service restaurant; Van Wyk's site is located in a business park with a new post office facility completed by Van Wyk and is part of a multi-use complex with residential and commercial development; and, Van Wyk submitted certifications regarding past dumping of hazardous waste and the government's environmental assessment that the development of the property would have no significant impact on the environment.